The Ohio Bell Telephone Company *and* Richard Whitmer. Case 09–CA–233901

October 28, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On March 26, 2020, Administrative Law Judge Christine E. Dibble issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

The issue presented here is whether the Respondent violated the Act when it disciplined employees for concertedly reporting to work in street clothes instead of required uniforms to draw the Respondent's attention to a uniform shortage. For the reasons given below, we agree with the judge that the employees' concerted protest was protected by the Act and that, accordingly, the disciplines were unlawful. However, we conclude that the protected concerted protest ended when the employees dispersed either to change into their uniforms and begin work or to retrieve their uniforms pursuant to the Respondent's lawful instruction. Accordingly, we reverse the judge's finding that the Respondent violated the Act by issuing attendance occurrences to employees who were not prepared to begin their scheduled shifts in uniform on time, and we shall omit the provision in the judge's recommended order that would have required the Respondent to pay these employees for the time it took them to retrieve their uniforms.

Background

The Respondent is a telecommunications provider. It employs premises technicians or "prem techs" to install telephone, television, and internet connection equipment in its customers' homes and businesses. Communications Workers of America, Local 4320 is the exclusive collective-bargaining representative of the Respondent's prem techs in and around Columbus, Ohio. No collective-bargaining agreement between Local 4320 and the Respondent was in effect at any relevant time.

The prem techs whose protest is at issue here work out of one of two garages, Ternstedt and Dublin, where they report each day before dispatching to customer sites. The Respondent maintains a "Branded Apparel Program" (BAP) policy, under which prem techs are required to report for work wearing branded apparel, i.e., uniforms displaying the Respondent's logo. The Respondent offers periodic opportunities to acquire new branded apparel, but prem techs sometimes run short, and the Respondent has occasionally permitted prem techs to work in nonbranded apparel.

In August 2018, the Respondent announced that it would expand the prem techs' work week from 5 to 6 days beginning in September.[2] Ternstedt Union Steward (and Charging Party) Richard Whitmer and several other employees discussed their concern that the expanded work week would cause more uniform shortages. Someone suggested drawing the Respondent's attention to this problem by reporting to work in street clothes on Saturday, September 8. Whitmer suggested Friday, September 7, instead because management would inevitably notice street clothes during team meetings scheduled for that day. Whitmer discussed the planned protest with at least seven other prem techs, including Dublin Union Steward Aaron VanVickle. VanVickle likewise discussed the protest with numerous other prem techs, including union stewards at other area garages. As Whitmer explained, "[t]he goal was to get management to recognize that there was a problem with our uniform situation and get us some uniforms, especially if they're going to require us to work six days a week, give us at least six days' worth of uniforms."

On Friday, September 7, approximately 15 Ternstedt prem techs, including Whitmer, and 14 Dublin prem techs, including VanVickle, reported to work in jeans and nonbranded shirts. Supervisors sought guidance from regional managers about how to respond. The Respondent's director of labor relations Stephen Hansen and other managers decided that participating prem techs would not be permitted to work that day in nonbranded apparel, would not be paid for any time required to retrieve and change into branded apparel, and would receive a documented verbal warning for violating the BAP policy.[3] Hansen testified that the Respondent decided to issue discipline to

[1] We shall amend the judge's conclusions of law and remedy, and we shall substitute a new Order and notice to conform to the violations found and in accordance with our decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020).

[2] Dates below are in 2018.

[3] We do not rely on the judge's findings that Hansen recommended issuing written warnings and 1-day suspensions or that management settled on a 1-day suspension and verbal warning.

prevent the work action from spreading to other facilities.[4] Accordingly, supervisors at each garage instructed prem techs to change into branded apparel, leaving work if necessary to do so. Most of the participating prem techs changed into branded clothing they had with them without delay, but six prem techs left work to retrieve branded apparel. As a result, these six were late for work anywhere from 1 to 2.5 hours and were not paid for that time (a total of 10.5 hours). Whitmer left work and did not return until the next morning.

The Respondent issued documented verbal warnings for violations of its BAP policy to 13 Ternstedt prem techs and 14 Dublin prem techs.[5] The Respondent also issued "attendance occurrences," or documented attendance infractions, to the seven employees who were not ready to begin work on time and in uniform.[6] The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing both the warnings and the attendance occurrences. The Respondent contends that it did not violate the Act because the protest was an unprotected partial strike or work slowdown. For the reasons below, we agree with the judge that the disciplinary warnings violated the Act, but we find that the Respondent lawfully issued the attendance occurrences.

Discussion

Section 7 of the Act provides, among other things, that employees have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. The prem techs engaged in concerted activity for the purpose of mutual aid or protection when they joined together to demonstrate their concern about uniform availability by reporting to work in street clothes. See, e.g., *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830 (1984) (concerted activity "clearly enough embraces the activities of employees who have joined together in order to achieve common goals").[7] But Section 7 does not protect *all* concerted activity for mutual aid or protection. In *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), the Supreme Court summarized "the normal categories of *unprotected* concerted activities" as "those that are unlawful, violent[,] . . . in breach of contract," or otherwise "indefensible" because showing a disloyalty unnecessary to carry on legitimate concerted activities. Id. at 17 (emphasis added). Thus, the prem techs' concerted protest was protected by the Act, unless it constituted or included conduct that rendered it unprotected.

The Respondent does not contend that the prem techs' concerted protest was unprotected under *Washington Aluminum* because it was unlawful, violent, in breach of contract,[8] or disloyal. Rather, it argues that the Act did not protect the protest under Board cases holding that partial strikes or work slowdowns constitute "indefensible" conduct.[9] What makes slowdowns and partial strikes indefensible is employees' persistent refusal either to work according to their employer's lawful requirements or to cease work entirely, taking on the status of strikers and permitting their employer to carry on its business with replacement workers.[10] The Board has explained that such conduct, even if concerted, is not protected because finding it so would confer on employees the authority unilaterally to determine their own conditions of employment.[11] Thus, the Board has found intermittent strikes, work slowdowns, and partial strikes (i.e., refusing to perform some work tasks while continuing to perform others) unprotected by the Act. As discussed below, the prem techs' protest here was none of these things.

First, the Board's intermittent strike cases have no bearing. As the Board has recently reaffirmed, "an intermittent strike unprotected by the Act is a strike pursuant to 'a plan to strike, return to work, and strike again.'"[12] Here, the prem techs' concerted protest did not involve a work stoppage at all,[13] but even if it had, no record evidence suggests that the prem techs planned to repeat the action,

[4] In addition to Hansen's testimony, the Respondent's brief to the Board acknowledges that the Respondent decided to issue warnings because it was concerned that the protest would spread to other facilities.

[5] The Respondent did not discipline two Ternstedt prem techs who participated in the September 7 action, Paul Holmes and Jeremy Mitchell, because they were not working at Ternstedt on September 28, the day the Respondent issued the Ternstedt disciplines. We do not rely on the judge's inaccurate statement that Holmes and Mitchell were not working at Ternstedt on September 7.

[6] The Respondent says that it has removed the attendance occurrences from the records of the prem techs involved.

[7] We affirm the judge's finding, which the Respondent does not separately contest, that the protest constituted union activity as well as concerted activity because it was coordinated and led by union stewards.

[8] We reject any suggestion by the Respondent that the protest violated an applicable collective-bargaining agreement because no collective-bargaining agreement was in effect at any relevant time. To the extent the Respondent suggests that the prem techs' conduct was unprotected solely because it violated the BAP policy, the suggestion is without basis in Board law. As "the Board long ago stated, 'employees engaged in [protected] concerted activity generally do not lose the protective mantle of the Act simply because their activity contravenes an employer's rules or policies.'" *International Shipping Agency, Inc.*, 369 NLRB No. 79, slip op. at 5 (2020) (quoting *Louisiana Council No. 17, AFSCME, AFL-CIO*, 250 NLRB 880, 882 (1980)).

[9] E.g., *Elk Lumber Co.*, 91 NLRB 333, 336–338 (1950).

[10] See, e.g., *Honolulu Rapid Transit Co.*, 110 NLRB 1806, 1809-1810 (1954).

[11] See, e.g., *Valley City Furniture Co.*, 110 NLRB 1589, 1594–1595 (1954), enfd. 230 F.2d 947 (6th Cir. 1956).

[12] *Walmart Stores, Inc.*, 368 NLRB No. 24, slip op. at 2 (2019) (quoting *Farley Candy Co.*, 300 NLRB 849, 849 (1990)).

[13] Again, the concerted protest was over by the time certain prem techs left to retrieve branded apparel, resulting in a delayed start to their workday.

a necessary element in establishing an intermittent strike.[14] Accordingly, the intermittent strike cases the Respondent relies upon do not support its position.[15]

Cases involving unprotected work slowdowns also do not support the Respondent's position. These cases involve concerted attempts by employees to interfere with efficient production *while remaining on the job*.[16] Here, there is no evidence that any prem tech at any time performed work at a slower than normal pace or otherwise attempted to interfere with the efficient performance of the Respondent's work while remaining on the job. Furthermore, the Board has long recognized that concerted activity sometimes has an incidental impact on production, and such impact does not, in itself, remove employees from the protection of the Act. *Johnnie Johnson Tire Co.*, 271 NLRB 293, 294-295 (1984) ("[C]oncerted activity . . . is normally held to be protected regardless of the time of day it occurs or the impact of such activity on production."), affd. mem. 767 F.2d 916 (5th Cir. 1985). The Respondent estimates that a total of 25 hours of work time was lost. It is not clear that the record supports this estimate.[17] Even assuming that the Respondent's estimate is accurate, however, the lost work time was not the result of a work slowdown. Therefore, we find that this impact did not remove the prem techs' concerted protest from the protection of the Act.[18] We accordingly find it unnecessary to rely on the judge's characterization of any delay caused by the protest as *de minimis*, or on her finding that the Respondent did not show that it had suffered any financial or operational harm as a result of the protest.

We also reject the Respondent's argument that "partial strike" cases, where employees refused to perform some job duties while continuing to perform others, are controlling here.[19] In those cases, the Board emphasized that a

[14] See *Farley Candy Co.*, 300 NLRB at 849; *First National Bank of Omaha*, 171 NLRB 1145, 1151 (1968), enfd. 413 F.2d 921 (8th Cir. 1969).

[15] The Respondent cites *National Steel & Shipbuilding Co*., 324 NLRB 499, 499 fn. 1, 509–510 (1997) (affirming, absent exception, judge's finding that employer lawfully disciplined employees for work stoppages that were part of a plan or strategy of intermittent recurrent strikes), enfd. on other grounds 156 F.3d 1268 (D.C. Cir. 1998); *Honolulu Rapid Transit Co.*, 110 NLRB at 1810–1811 (employer lawfully disciplined employees who participated in "a regular weekend strike"); and *Valley City Furniture Co.*, 110 NLRB at 1594–1595 (employer lawfully disciplined employees who communicated intention to regularly refuse to work required overtime).

[16] The Respondent cites *DaimlerChrysler Corp.*, 344 NLRB 1324, 1325-1326 (2005) (employer lawfully warned union steward who encouraged employees to slow down work by "back tracking," to refuse to arrange car pool participants and "shoot down" management arrangements, and to "work the rule"), overruled in part on other grounds by *General Motors, LLC*, 369 NLRB No. 127 (2020); *Davis Electrical Constructors, Inc.*, 216 NLRB 102, 106–107 (1975) (employer lawfully discharged employees who slowed down pace of construction work in order to minimize unpaid downtime); and *Elk Lumber Co.*, 91 NLRB at 336–338 (employer lawfully discharged employees who concertedly slowed down work in order to protest a decrease in pay). All three cases are plainly distinguishable from the instant case, in which no employee slowed down work while remaining on the job or encouraged other employees to do so.

[17] The record establishes that six employees delayed starting work for a total of 10.5 hours on September 7 and that Whitmer did not work at all that day. Whitmer testified, however, that prem techs ordinarily work as late as necessary to accomplish all assigned tasks. Labor Relations Director Hansen, who estimated the lost time at around 25 hours, further testified that he did not know whether any customer appointment had been missed or rescheduled. Accordingly, the record does not establish whether employees who started late on September 7 worked fewer hours than they otherwise would have worked, how much overall work time (if any) was actually lost, or whether the protest affected Respondent's provision of service to any customer.

[18] Cf., e.g., *Accel, Inc.*, 339 NLRB 1052, 1052 (2003) (rejecting argument that work stoppage was unprotected because it was a "disproportionately disruptive response to a trivial grievance"); *Lumbee Farms Cooperative*, 285 NLRB 497, 506–507 (1987) (rejecting argument that walkout was unprotected because timing resulted in economic harm including loss of product), enfd. 850 F.2d 689 (4th Cir. 1988), cert. denied 488 U.S. 1010 (1989); *Plastilite Corp.*, 153 NLRB 180, 183-184 (1965) ("[T]he determination of whether a 'labor dispute' exists does not depend on the *manner* in which the employees choose to press the dispute, but rather on the *matter* they are protesting. Where a 'labor dispute' exists, the employees may engage in a peaceful primary strike *or any other lawful manner of protest* and still retain the protection of the Act.") (citations omitted, third emphasis added), enfd. 375 F.2d 343 (8th Cir. 1967); accord *Washington Aluminum*, 370 U.S. at 16 ("[I]t has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not."); *NLRB v. A. Lasaponara & Sons*, 541 F.2d 992, 998 (2d Cir. 1976) (work stoppage that "undoubtedly brought inconvenience and economic loss" did not therefore lose protection of the Act), enfg. 218 NLRB 1096 (1975), cert. denied 430 U.S. 914 (1977); *First National Bank of Omaha v. NLRB*, 413 F.2d 921, 923 & fn. 1 (8th Cir. 1969) (rejecting bank's argument that "potential of peculiar and unique harm" rendered employee walkout unprotected), enfg. 171 NLRB 1145 (1968). In the rare cases where reviewing courts have found a loss of protection by considering the relationship between the goal of concerted employee action and the action's potential impact on employer operations, they did so in circumstances very different from those in this case. See *Dobbs Houses, Inc. v. NLRB*, 325 F.2d 531, 538–539 (5th Cir. 1963) (finding waitresses' walkout at busy dinner hour unprotected because not reasonably related to protest over purported discharge of supervisor), denying enf. to 135 NLRB 885 (1962); *NLRB v. Marshall Car Wheel & Foundry Co.*, 218 F.2d 409, 413 & fn. 7 (5th Cir. 1955) (finding metal workers' walkout unprotected because timed to maximize property damage and financial loss by withdrawing labor necessary to safely pour molten metal), denying enf. to 107 NLRB 314 (1953).

[19] See, e.g., *Electronic Data Systems Corp.*, 331 NLRB 343, 343-344 (2000) (employer lawfully discharged employee who encouraged others to withhold services from one employer client while continuing to provide identical services to others); *Yale University*, 330 NLRB 246, 246 (1999) (employer lawfully warned instructors who refused to submit grades while continuing to perform other job duties); and *Audubon Health Care Center*, 268 NLRB 135, 136–137 (1983) (employer lawfully discharged nurses who refused to care for certain nursing-home residents while continuing to care for others); see also *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946) (finding employer lawfully disciplined employees who persistently refused to perform certain work in order to support strikers at a different employer facility while continuing to perform other work), denying enf. to 64 NLRB 432 (1945).

partial work stoppage is indefensible "because it constitutes an attempt by employees to set their own terms and conditions of employment *while remaining on the job*." *Electronic Data Systems Corp.*, 331 NLRB at 343 (emphasis added) (citing *Audubon Health Care Center*, above).[20] Accordingly, the Board has found that an employer faced with employees who refuse to perform a required job duty may lawfully require them to leave the premises;[21] only when employees refuse *either* to work as directed *or* to depart does their conduct cross the line from protected to unprotected.[22] In the instant case, no prem tech at any time refused to perform services that the Respondent is in the business of providing.[23] But even assuming, without deciding, that adhering to a uniform requirement can be characterized as a job duty, none of the disciplined employees attempted to work in street clothes after the Respondent instructed them to change into branded apparel.[24] The majority of employees changed their clothes in the garage and continued their work day without interruption. The seven employees who were not prepared to immediately don branded apparel followed the employer's lawful instruction to depart the premises until they were prepared to work as required. Because no employee refused to work as instructed while remaining on the job, nor did any employee refuse a direction to leave the premises, the prem techs' protest did not constitute an unprotected partial strike under controlling law.

In sum, because the prem techs' conduct was not an intermittent strike, work slowdown, or partial strike, the Respondent has not established that their otherwise protected concerted protest was unprotected. We therefore affirm the judge's conclusion that the Respondent violated the Act by issuing the prem techs documented verbal warnings for engaging in protected concerted (and union) activity. However, the prem techs' concerted protest ended when they dispersed and either changed into branded apparel to begin work or left the Respondent's facility to retrieve required apparel. Because employees who left to retrieve branded apparel and consequently did not begin work on time were no longer engaged in concerted activity, we reverse the judge's finding that the Respondent violated the Act by issuing attendance occurrences to these employees. We also disagree with the judge's recommendation that the Respondent be required to make whole the seven employees for the time it took them to retrieve branded apparel. Because the employees were no longer engaged in protected concerted activity during that time, we find merit in the Respondent's argument that it was not required to pay them, and we shall not order it to do so.

Furthermore, we do not rely on the judge's suggestion that the legal status of the disciplines issued for violations of the BAP policy turns on the consistency or inconsistency of the Respondent's past enforcement of that policy.[25] As noted above, the Respondent acknowledges that it decided to discipline the prem techs to limit the spread of the work action—that is, to curtail not just any infractions of its uniform policy, but specifically *concerted* infractions. Because the causal connection between the employees' protected concerted conduct and the Respondent's decision to issue discipline is thus directly established, we need not consider circumstantial evidence of disparate enforcement that could otherwise support finding that the Respondent issued the disciplines for a discriminatory motive.[26] Indeed, prior *consistent* enforcement of the BAP policy against individual (i.e., nonconcerted) infractions could not make it lawful for the Respondent to apply the policy to discipline protected

[20] Cf. *NLRB v. Montgomery Ward & Co.*, 157 F.2d at 496 ("[E]mployees . . . could not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work.").

[21] *E.R. Carpenter Co.*, 252 NLRB 18, 22 (1980).

[22] See *Audubon Health Care Center*, 268 NLRB at 136–137 (employer lawfully discharged nurses who, inter alia, refused employer's instruction to leave the premises until compelled to do so by police); cf. *C.G. Conn, Ltd. v. NLRB*, 108 F.2d 390, 395, 397–398 (7th Cir. 1939) (employer lawfully discharged employees who signed a card indicating their intent to continue to refuse to work mandatory overtime), denying enf. to 10 NLRB 498 (1938).

[23] Cf. *Electronic Data Systems Corp.*, 331 NLRB at 343–344 (finding unprotected emails encouraging employees to withhold services from one particular client while continuing to provide identical services to others); *Yale University*, 330 NLRB at 247 (finding unprotected instructors' persistent refusal to turn in grades while continuing to perform other job duties); *Audubon Health Care Center*, 268 NLRB at 136–137 (finding unprotected nurses' refusal to care for certain nursing-home residents while continuing to care for others).

[24] We do not rely on the judge's finding that no record evidence showed that any prem tech who participated in the protest arrived at customers' homes or businesses in street clothes. To the contrary, witnesses testified that one participating prem tech, Paul Holmes, dispatched to a customer's home in jeans. However, the legal status of Holmes's individual conduct is not before the Board because, as noted above, the Respondent did not discipline Holmes.

[25] Relatedly, we do not rely on any implication in the judge's decision that the Respondent effectively waived or rescinded the BAP policy by failing consistently to enforce it.

[26] See, e.g., *CGLM, Inc.*, 350 NLRB 974, 974 fn. 2 (2007) (unnecessary to analyze employer's motive for discipline of employees for protected concerted act of "going on strike" because "'the existence or lack of unlawful animus' is not material when 'the very conduct for which employees are disciplined is itself protected concerted activity'") (quoting *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981)), enfd. mem. 280 Fed. Appx. 366 (5th Cir. 2008); accord *EYM King of Missouri, LLC d/b/a Burger King*, 365 NLRB No. 16, slip op. at 1 fn. 4 (2017), enfd. 726 Fed. Appx. 524 (8th Cir. 2018); *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed. Appx. 524 (D.C. Cir. 2003).

concerted conduct. See *Nor-Cal Beverage Co.*, 330 NLRB 610, 611–612 (2000) (finding that judge erroneously considered evidence of employer's consistent past application of its no-harassment policy where the "causal connection" between the employee's protected conduct and the discipline issued under the policy was "undisputed").[27]

Finally, we do not rely on the judge's citation to cases applying the rule of *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), that employees generally have a Section 7 right to display union insignia in the workplace. The judge cited cases in which the Board has extended this right to concerted clothing displays other than union insignia.[28] Each of those cases, however, involved a signal that would be understood by anyone observing a single employee wearing the article of clothing. Here, by contrast, the prem techs' clothing conveyed a message only in the context of the entire group. Dispatching to customer sites individually in street clothes would have communicated no work-related message. At the same time, finding a Section 7–protected right for the prem techs to dispatch in street clothes would substantially impair the Respondent's legitimate interest in presenting individuals readily identifiable as its employees to its customers at their homes and businesses. Accordingly, we find the insignia rule of *Republic Aviation* inapplicable here.

AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent has violated Section 8(a)(3) and (1) of the Act by issuing documented verbal warnings to employees because of their union and protected concerted activity of reporting to work in street clothes on September 7, 2018.

3. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

Having found that the Respondent has violated Section 8(a)(3) and (1) by issuing disciplinary warnings to certain employees because of their protected concerted and union activity, we shall order it to rescind these warnings, expunge the warnings from its files, inform the employees in writing that this has been done and that the warnings will not be used against them in any way, and post a remedial notice.

ORDER

The National Labor Relations Board orders that the Respondent, the Ohio Bell Telephone Company, Columbus and Dublin, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining employees because of their protected concerted or union activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful warnings issued to employees for participating in union and protected concerted activity on September 7, 2018.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warnings issued to Richard Whitmer, Sammy Muoy, Willie Cooley, Nick Kness, Derek Kinsey, Kyle Kemper, Scott McAndrew, Thomas Phelps, Tyler Hill, Brian Hinkle, Jalen Smith, Nick Phillips, Douglas Orr, John Senn, Phillip Rengifo, Dennis Kelty, Justin Doyle, Brandon Balluf, Jason Damron, Ryan Stephens, Rajpal Punia, Ian McMahon, Jesse Lewis, Douglas Faiella, Jesse Canter, Aaron VanVickle, and Anthony Donnelly, and within 3 days thereafter, notify the employees in writing that this has been done and that the warnings will not be used against them in any way.

(b) Post at its Columbus and Dublin, Ohio, facilities copies of the attached notice marked "Appendix."[29]

[27] Because, as discussed above, we find that the employees' concerted activity had ended when certain employees left the garage to retrieve branded apparel, the Respondent's past enforcement of its attendance policy is also irrelevant to the question whether the Respondent's issuance of attendance occurrences to those employees violated the Act.

[28] *Goodyear Tire & Rubber Co.*, 357 NLRB 337 (2011) (employer could not lawfully prohibit t-shirts with message critical of employer's contracting practice); *Medco Health Solutions of Las Vegas, Inc.*, 357 NLRB 170 (2011) (employer could not lawfully prohibit t-shirt with message critical of employer's performance-incentive program), set aside and remanded in relevant part 701 F.3d 710 (D.C. Cir. 2012), affd. on remand 364 NLRB No. 115 (2016); *Stephens Media, LLC d/b/a Hawaii Tribune-Herald*, 356 NLRB 661 (2011) (employer could not lawfully prohibit buttons and armbands supporting discharged or suspended employees), enfd. 677 F.3d 1241 (D.C. Cir. 2012).

We do not rely on the judge's citation to *American Arbitration Association, Inc.*, 233 NLRB 71 (1977), where the Board found that certain conduct was unprotected because disloyal and disparaging without addressing the legal status of a related dress-code violation. We also do not rely on the judge's citation to *Chinese Daily News*, 353 NLRB 613 (2008), a case decided by a two-member Board. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010).

[29] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed due to the Coronavirus Disease 2019

Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 7, 2018.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 9 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 28, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT issue disciplinary warnings to you because you engage in protected concerted or union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawful warnings issued to employees for participating in union and protected concerted activity on September 7, 2018.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to the unlawful warnings given to Richard Whitmer, Sammy Muoy, Willie Cooley, Nick Kness, Derek Kinsey, Kyle Kemper, Scott McAndrew, Thomas Phelps, Tyler Hill, Brian Hinkle, Jalen Smith, Nick Phillips, Douglas Orr, John Senn, Phillip Rengifo, Dennis Kelty, Justin Doyle, Brandon Balluf, Jason Damron, Ryan Stephens, Rajpal Punia, Ian McMahon, Jesse Lewis, Douglas Faiella, Jesse Canter, Aaron VanVickle, and Anthony Donnelly, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the warnings will not be used against them in any way.

THE OHIO BELL TELEPHONE COMPANY

The Board's decision can be found at https://www.nlrb.gov/case/09-CA-233901 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

(COVID-19) pandemic, the notices must be posted within 14 days after each facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Zuzana Murarova, Esq., for the General Counsel.
Steven J. Sferra, Esq.; and *Jeffrey A. Seidle, Esq.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Cincinnati, Ohio, on July 23, 2019. Rick Whitmer (the Charging Party/Whitmer), filed the initial charge in case 09–CA–233901 on January 10, 2019,[1] and the first amended charge was filed on March 8, 2019. On March 26, 2019, the second amended charge was filed. The Acting Regional Director for Region 9 of the National Labor Relations Board (NLRB/the Board) issued the complaint and notice of hearing against the Ohio Bell Telephone Company (the Respondent) on April 8, 2019.[2] The Respondent filed a timely answer denying all material allegations.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) when about on or about September 25 and 28, and October 5, 8, 11, 12, and 16, the Respondent issued attendance occurrences and placed attendance punctuality discussion documents in several employees' files and, or issued written warnings to several employees because they engaged in concerted protected activities.

In the posthearing brief filed on September 9, 2019, counsel for the General Counsel noted that the complaint inadvertently failed to specify that "employee Anthony Donnelly ("Donnelly") received discipline for briefly wearing his street clothes to complain about the condition of his company-issued uniforms on about October 12, 2018 in violation of Section 8(a)(1) and (3) of the Act." (GC Br. 20.) The Respondent did not file an objection. Based on the General Counsel's argument and the evidence, I will permit the amendment because it is sufficiently related to existing allegations, has been fully litigated, and the Respondent would suffer no undue prejudice.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation headquartered in Cleveland, Ohio, provides telecommunications services to customers throughout Indiana, Michigan, Ohio, Wisconsin, and a portion of Illinois.[3] During the calendar year ending March 1, 2019, the Respondent in conducting its operations provided services valued in excess of $50,000 for enterprises within the State of Ohio which are directly engaged in interstate commerce. The Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operation

The Respondent, a subsidiary of AT&T, provides television, internet, and phone services to businesses and residential customers in the five-state Midwest region of Ohio, Indiana, Michigan, Wisconsin, and parts of Illinois. (Tr. 9–10.) Among other locations, the Respondent has offices and places of business in Columbus and Dublin, Ohio. Andy Bentz (Bentz) was the Director Internet and Entertainment Field Service (IEFS) for Ohio. During the period at issue, Shawn Jenkins (Jenkins) was the area manager network services, technology operations IEFS. Since March 2014, Stephen Hansen (Hansen) has been the director of labor relations. His supervisor, Randy White (White), is the vice president of labor relations for the Midwest states.

In late 2006, the Respondent launched U-Verse, "a terrestrial, i.e., underground service that provides IP-based video, television content, high speed internet and voice service to residential homes via the IP network. In January 2007, Respondent began to hire premises technicians in the Columbus area to install and repair U-Verse services to customers' homes." (Tr. 10–11.) The premise technicians ("prem techs") are assigned to various garages throughout the state, including the facilities at issue, the Respondent's Ternstedt garage (Ternstedt) in Columbus, Ohio, and the Dublin garage (Dublin) in Dublin, Ohio. At the beginning of their work day, the prem techs come to the garages to get their AT&T vans and tools, meet with supervisors if needed, and leave for a day in the field completing work for customers.[4] During the period at issue, Scott Jones (Jones) and Corey Peters (Peters) were supervisors at Ternstedt. Ed Griffin (Griffin) and Renee Matney (Matney) supervised the Dublin location.[5] Jones, Peters, Griffin and Matney each supervise between 12 to 20 prem techs.

The Communications Workers of America, Local 4320 (the Local) is a subdivision of the Communications Workers of America, International Union, AFL–CIO (CWA). The CWA has at all material times been the exclusive bargaining representative of the "bargaining unit employees who work in the company's

[1] All dates hereinafter are in 2018, unless otherwise indicated.

[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "CP Exh." for Charging Party's exhibits; "GC Br." for General Counsel's brief; "R. Br." for Respondent's brief; and "CP Br." for Charging Party's brief.

[3] During the hearing, the parties interchangeably used the names "Ohio Bell" and "AT&T" to refer to the Respondent.

[4] After the end of their work shifts, an unknown number of prem techs are allowed to house their AT&T vans at their homes. The company-provided vans bear the AT&T logo on multiple sides.

[5] Manager Network Services, Internet and Entertainment Field Services is the official title for Jones, Peters, Griffin, and Matney.

operations throughout the traditional five state Midwest region of Indiana, Michigan, Ohio, Wisconsin, and a small portion of Illinois." (Tr. 9–10.) The parties have entered into successive collective-bargaining agreements (CBA), the most recent agreement was effective April 12, 2015, through April 14, 2018. "[E]ffective June 14, 2006, and the result of the negotiations conducted during May 2006, Respondent and other affiliated entities executed a memorandum of agreement with CWA, known as the premise technician agreement identified as Appendix F to the part[ies]' CBA, setting forth the wages and terms and conditions of employment for the newly created job title of premises technician." (Tr. 10.) After the expiration of the most recent CBA, the bargaining unit members began working without a contract. Consequently, the parties engaged in negotiations throughout 2018.

Since fall 2013, the Charging Party has been employed as a prem tech at Ternstedt; and continued to work there until the spring of 2019, when he went on leave for a medical condition. At all relevant times, Jones was Whitmer's supervisor.

B. The Respondent's Dress Code Policy

The Premises & Wire Technician Guidelines (the Guidelines) govern workplace expectations for prem techs and wire technicians; and was last updated in April 2016. The Guidelines were in effect during the period at issue. Included in the Guidelines is a section setting forth the terms of the mandatory Branded Apparel Program (BAP) for prem techs and other employees. According to the Guidelines, the BAP is "to ensure that AT&T technicians project and deliver a professional, business-like image to our customers and community."[6] The Guidelines require that "All technicians will be prepared to work at the start of the work day, in proper branded apparel." Moreover, section 14.2 of the Guidelines states:

> BAP is mandatory for all SD&A Premises & Wire Technicians on work time. No other shirt, hat, pants/shorts, shorts or jacket will be worn without management approval. Shirts must be tucked into the technician's pants/shorts at all times. Technicians must wear a belt, threaded through the pant/short belt loops. Pants/shorts must be worn around the waist with no undergarments showing.

(R. Exh. 3.) During a period designated by the Respondent, prem techs are allowed to order company-branded apparel through a company approved online vendor. The Respondent gives prem techs money to order five pairs of branded navy pants, five pairs of polo shirts with the AT&T logo on them, and in some circumstances a hat, jacket, or socks.[7] Management has been flexible in allowing employees to wear nonbranded coats or jackets in severe cold weather. Supervisors also have allowed nonbranded pants if they are neutral blue, black or navy, and nonbranded hats as long as they are also plain and without a logo.[8] Prem techs are not allowed to wear denim jeans. Pursuant to the Guidelines, "If the clothing or boots are deemed inappropriate, the technician will be sent home unpaid. This will be considered an unexcused absence until the technician returns to work in the proper attire." (R. Exh. 3.) While working in the field, prem techs must also wear AT&T identification badges, which include their photograph and the Respondent's logo.

The Respondent developed the Midwest Manager's Guide to Corrective Action ("MMGCA") to instruct supervisors on the appropriate disciplinary actions to take against nonmanagement employees for work infractions. Included in the MMCGA is a directive that prem tech supervisors are authorized to issue a written warning and a 1-day suspension to prem techs who failed to comply with the BAP.[9] Generally nonconforming coats and pants, so long as they are the appropriate color and style, have not resulted in disciplinary action against prem techs. Witnesses agreed that if supervisors observed prem techs in the garage (or the field) wearing nonconforming hats, they would usually instruct them to remove the hat, and the prem tech would comply.

C. September 7 Premise Technician Demonstration

During a Friday morning "huddle" in August 2018, the prem techs were notified that effective September 2018, the Respondent would implement a mandatory 6-day workweek.[10] The prem techs complained: (1) the window to order apparel was not offered with sufficient frequency; and (2) the "wear and tear" on the branded clothing and vendor mistakes in the ordering process left employees with an insufficient number of branded items to wear, especially for a 6-day mandatory workweek. Prem techs claim that for several years leading to the events of September 7, they made management aware of the complaints about torn and tattered branded apparel and the insufficient number of opportunities to order branded apparel. However, they felt management's responses were ineffective and apathetic with regard to resolving the BAP problems. On the whole, management denied that prior to September 7, prem techs had complained to them about the poor quality of their branded clothes.[11]

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[6] Premises Technician Guidelines, sec. 14.1

[7] There was conflicting testimony about the frequency with which prem techs were allowed to order company-branded apparel.

[8] At least one supervisor testified that he does not allow prem techs to wear nonbranded hats. This will be discussed in more detail later in the decision.

[9] Testimony differs in some respects on this count. Hansen testified the MMGCA lists the expected discipline but conceded on cross-examination that he had no direct knowledge of it being followed. (Tr. 270–272). In his 3 years as a prem tech and steward, Aaron VanVickle (VanVickle) testified that he could not recall a single instance of discipline related to dress code violations. (Tr. 164.) Matney and Griffin acknowledged that for the dress code violations they have observed, they have not issued discipline. (Tr. 304, 309; Tr. 335–336.) Matney, Griffin, and Jones also declined on various occasions to discipline three employees who wore jeans to customers' homes. (Tr. 292, 304, 320–321.)

[10] Supervisors at Terndstedt and Dublin held weekly morning meetings with prem techs on Fridays to discuss safety items, and other work-related issues. The meeting is called a "huddle" and lasts from 30 minutes to an hour.

[11] Whitmer, Tom Phillips (Phillips), VanVinckle, and Ryan Stephens (Stephens) heard complaints from coworkers to this effect; and they had conversations with management so felt management was aware of the problem. They also testified that their first-level supervisors would hear their complaints, but then blame bargaining or other issues for the delay, or simply fail to act. Matney, however, denied ignoring complaints about the branded apparel but instead would go through the process to have them replaced by the manufacturer. She further claimed that no one on her team ever came to her with an issue with branded apparel in 2018 up

As a result of the announcement about the mandatory 6-day workweek, several of the prem techs began to communicate among themselves about organizing a collective action to protest the change.[12] A prem tech (name unknown) suggested coming to work on Saturday, September 8 in "street clothes" to indicate their displeasure to management about the change. However, Whitmer recommended engaging in the action on Friday (September 7), "because then everybody will see it. They will hear us, and maybe we can get something done, and we can get the uniforms taken care of." (Tr. 53.) Whitmer spoke with several prem techs in Ternstedt and Dublin encouraging them to participate in the protest on September 7;[13] and other prem techs also spread word of the idea to those in other garages. Ultimately, only about 30 prem techs from Ternstedt and Dublin participated in the protest. The goal of the September 7, protest was described differently by the witnesses. The various articulated goals were to draw management's attention to the prem techs' objection to the mandatory 6-day workweek; force management to acknowledge and resolve problems prem techs had getting uniforms; show unity during contract negotiations; and give validity to their collective "irritation and outrage". (Tr. 54, 169, 206.)

On September 7, the huddle was scheduled to begin at 8 a.m. at Ternstedt and Dublin for all the crews. Approximately 30 prem techs came to work at Ternstedt and Dublin in jeans and, or other noncompliant clothing.[14] The Ternstedt supervisors, Jones and Peters, appeared for the Friday huddle for their respective crews and noticed that some of the prem techs were wearing jeans. About 8 to 12 prem techs on Jones' crew were in nonbranded apparel, and an unstated number in Peters' crew. Instead of starting the huddles, Jones and Peters left the meeting room to confer with Shawn Jenkins (Jenkins), area manager, about what action to take to address the situation. Jones acknowledged, "I think we [Jones and Peters] recognized that it was a possible work action. We weren't sure." (Tr. 316.) Jones and Peters proceeded with the huddle until about 40 minutes into the meeting when Jenkins responded by instructing them to tell the prem techs to change into their company-branded clothes; and if they had to leave work to get their clothing, they would be on unpaid time for that period.[15] Consequently, Supervisor Peters instructed the prem techs in his crew in nonbranded apparel to put on their branded apparel and get to work. Jones gave a similar instruction to his crew. Eight of the 15 prem techs who wore jeans and, or other nonbranded clothes to the huddle had company-branded apparel in their work or personal vehicle. They changed into their branded apparel in the garage. Ultimately, all of the Ternstedt prem techs in nonbranded apparel, except Whitmer, changed into company-branded apparel and returned to work the same day. Whitmer went home for the remainder of the day.

On September 7, prem techs arrived in the crew rooms at Dublin for the huddle with their respective supervisors, Matney and Griffin. Matney started the huddle with her crew but noticed that all except one of the prem techs were wearing jeans. Consequently, she briefly stepped away from the meeting to contact Area Manager Travis Vandermark ("Vandermark") for guidance on addressing the situation. Matney continued with the meeting while waiting to hear from Vandermark. Approximately 10 minutes later she received instructions on handling the matter; and told the prem techs that those in nonbranded apparel had to change into their company-branded apparel ready to work. The prem techs complied. However, prem techs who had to leave the premises to change into proper clothing were not paid for that time.

Prior to starting the huddle on September 7, Griffin saw several prem techs enter the crew room in jeans. He began the meeting but about 15 minutes later Jason Cook (Cook), assistant to the director, and Matney called him into the hallway to tell him to notify all the prem techs that they had to change into company-branded apparel before they could begin work. He reentered the crew room and relayed the directive to the prem techs. All of the prem techs on his crew had company-branded clothes in their vehicles or on the premises and were able to quickly change and go to work. Between Ternstedt and Dublin, management estimates that the Company lost about 25 hours in work productivity because of the action.[16]

D. Discipline of Involved Premise Technicians

Hansen learned of the September 7, prem techs' protest while he was on the bargaining team for a new CBA and saw a post about it on the Respondent's internal managers' website. Bentz also telephoned Hansen that at "a couple of garages" there were a large number of employees who came to work on September 7, in nonbranded apparel. Hansen discussed the situation with his supervisor, Randy White (White), and other [managers] on the bargaining team. Their immediate response was not to pay the prem techs who came to work on September 7 for the time they needed to change into their company-branded apparel. Factors that went into this decision were if they would allow employees to work if they did not have the proper branded apparel

until September 7. Griffin recalled only one complaint, which was resolved within a couple of days. Jones stated he did not recall whether Whitmer ever complained to him about his branded apparel.

[12] Communication about a possible job action to protest the mandatory 6-day workweek occurred in the form of texts and, or telephone calls.

[13] Whitmer specifically recalled speaking about the possible job protest with VanVickle, McNess (first name unknown), Phillips, Jalen Smith (J. Smith), Tim Hall (Hall), Derrick Kinsey (Kinsey), Hollis Brown (Brown), and Stephens.

[14] Although the testimony is undisputed that about 30 prem techs came to work on September 7 in nonbranded apparel, the witnesses' recollection differed from the documentary evidence on the exact number of prem techs in each crew was present on September 7 and the number of prem techs who participated in the action. (GC Exhs. 2–8.)

[15] This differs from Whitmer's statement in which he asserted that Scott and the managers were on their phones when the meeting was scheduled to start. According to Whitmer, Scott walked into the meeting about 8:40 a.m. and told employees to get into their branded apparel and go to work. The prem techs complied, except for him. Whitmer went home and did not return until the next day.

[16] Hansen testified that the lost in work productivity was based on an estimate that included the overtime some prem techs had to work to cover for others who were not available to work. He also claimed that some customers had to be delayed or rescheduled. (Tr. 278.) He conceded later on cross-examination that he did not have any first-hand knowledge of any customer or employee impacted by the protesting employees' actions. (Tr. 280.)

and if the answer to that question is no, then those employees should not be paid because they did not come to work prepared to work.[17] Hansen believed the September 7 action was a violation of the prem tech Guidelines, explaining they were concerned it would spread to other garages in other states at a particularly sensitive time during contract negotiations. However, Hansen admitted that he realized the prem techs coming to work on September 7 was "a planned event. . . ." (Tr. 260–261.) After discussing the situation with White and his "peers," Hansen recommended to Bentz that the prem techs who wore nonbranded apparel to work on September 7, receive a written warning and 1-day suspension. He also discussed his disciplinary recommendations with business unit managers, Liz Millet (Millet) and Valerie Hunter (Hunter). According to Hansen, due to the ongoing bargaining over a new CBA, management tried to be lenient in meting out discipline which is why they settled on the 1-day suspension and verbal warning.

On or about September 28, Scott began meeting individually with prem techs and Whitmer, as their union steward, to interview and discipline them about their action on September 7. Jones and Whitmer, however, quickly agreed to allow Jones to meet collectively with and issue documented verbal warnings to all except two employees who participated in the September 7 action. (GC Exh. 5.)[18] Whitmer was also issued the same discipline in his capacity as a prem tech because he wore jeans to work on September 7. Jones inadvertently failed to discipline Paul Holmes (Holmes) and Jeremy Mitchell (Mitchell) because they were not working at Ternstedt on September 7. He never corrected the error. Last, Jones acknowledged that he does not recall ever disciplining anyone for nonconformity with the company-branded apparel requirement.

On October 5, 8, 11, 12, and 16, Matney issued discipline for both crews in the Dublin garage because Griffin was on paternity leave. She met with each prem tech and asked them a series of questions before issuing the punishment. She retained notes of the interviews showing that several of the prem techs told her they wore jeans on September 7 to protest conditions of employment. (GC Exh. 8.) Although Matney initially denied that any of the prem techs told her the reason they wore jeans on September 7, she later acknowledged that during the disciplinary interview on October 5, a few employees informed her that they wore jeans as part of a union effort. (Tr. 306–309; GC Exh. 8.) In a meeting with Matney, VanVickle was issued discipline later than the other prem techs because he was on vacation. (GC Exh. 6.) Similar to Jones, Matney testified that she has never disciplined a prem tech for wearing non-apparel pants that closely resemble the branded pants. Although Matney has told prem techs wearing nonbranded hats to remove them, she has not disciplined them for it. Griffin has, however, in the past issued documented discussions (coaching) when "a couple" of prem techs were caught by him wearing nonbranded hats. (Tr. 344.) In response to the prem tech's action on September 7, the Respondent also placed attendance punctuality discussion documents in the "files" of employees from both Tendstedt and Dublin who had to leave work to get their uniforms before they could begin work.

The union filed grievances disputing the disciplinary actions issued to all of the prem techs for their actions on September 7. According to the Respondent, it agreed to remove the attendance discussions from the employees' files. However, the General Counsel contends that the grievances were denied at the third step of the grievance process and have not been resolved. Moreover, the General Counsel insists the grievances cannot be arbitrated because the CBA has expired. (GC Br. 11; Tr. 61–62, 270, 281; GC Exhs. 2, 3.)

III. DISCUSSION AND ANALYSIS

The rights guaranteed in Section 7 include the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." See Section 7 of the Act. Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act.

In *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and in *Meyers Industries (Meyers II),* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, "the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Whitaker Corp.*, 289 NLRB 933 (1988) (quoting *Owens-Corning Fiberglass Corp. v. NLRB*, 407 F.2d. 1357, 1365 (4th Cir. 1969). Individual action is concerted if it is engaged in with the object of initiating or inducing group action. A conversation can constitute concerted activity when "engaged in with the object of initiating or inducing or preparing for group action or [when] it [has] some relation to group action in the interest of the employees." *Meyers II*, supra, 281 NLRB at 887 (quoting *Mushroom Transportation Co.,* 330 F.2d 683, 685 (3 Cir. 1964)). The object of inducing group action, however, need not be expressed depending on the nature of the conversation. See *Sabo, Inc. d/b/a Hoodview Vending Co.*, 359 NLRB 355, 358–359 (2012) (vacated but incorporated by law *Hoodview Vending Co.*, 362 NLRB 690 (2015). Moreover, *Meyers I* and *II* does not require that concerted activity be well-organized or effective, it needs only be engaged in for other employees for mutual benefit. *See also Stephens Media*, 356 NLRB 661, 679 (2011) (finding the wearing of red arm bands to be protected concerted activity even where no evidence was offered showing management was aware of their purpose).

1. Charging Party and other prem techs engaged in concerted protected activity

I find that the evidence establishes Whitmer and the other prem techs engaged in concerted activity. It is undisputed that

[17] Hansen insisted that the prem techs were treated no differently than in other instances when employees were sent home without pay to retrieve a driver's license, company identification card, work boots, or other items necessary for the performance of their duties.

[18] The verbal warning letters list either Peters or Jones as the letters' author. (GC Exh. 5.)

the prem techs and several union stewards at Ternstedt and Dublin discussed among themselves that the Respondent had failed to address their complaints about giving them a sufficient supply of BAP-compliant clothing, especially with the mandate to work a mandatory 6-day workweek. After talking with union stewards and coworkers on ways to bring their complaints to management's attention, the prem techs decided to take collective action and wear street clothes to the huddles on September 7. Whitmer's and the prem techs' actions are the epitome of protected union and concerted activity because they came together in an attempt to force management to address their complaints about an insufficient supply of company-branded apparel. See *New River Industries, Inc*., 945 F.2d 1290, 1294 (4th Cir. 1991) (quoting *City Disposal Systems, Inc*., 465 U.S. 822, 830 (1984) (under the Act the term "concerted activity" "clearly embraces the activities of employees who have joined together in order to achieve common goals.").

I also find that despite the Respondent's protestations to the contrary, it was aware that the prem techs were engaging in a concerted protest. Hansen testified that he believed the prem tech's September 7, action was "a planned event. . . ." (Tr. 260–262.) Hansen noted various demonstrations had occurred in the midst of the parties bargaining over a new contract. In 2018, the Respondent's other Midwest employees had worn union buttons, picketed, and engaged in various demonstrations to protest workplace conditions. Hansen's knowledge of the prem techs' action being a concerted activity is buttressed by his admitted concern, in light of the sporadic 2018 employee demonstrations, that the prem techs' actions could spread to other garages. Likewise, Jones testified that he and Peters, "recognized it was a possible work action. We weren't sure." (Tr. 316.) Matney admitted that during the disciplinary interviews, a few prem techs told her they wore jeans on September 7 to protest working conditions (i.e., insufficient supply of uniforms and the mandatory 6-day workweek). (Tr. 306–307; GC Exh. 8.) See *Kysor Industries Corp*., 309 NLRB 237 (1992) (finding that the employer knew that employees who assembled at a supervisor's desk to seek clarification of their work assignments were engaged in protected concerted activity notwithstanding that the employees did not explain their confusion was related to two notices the employer recently issued.).

2. Charging Party and other prem techs concerted activity was protected

Pursuant to section 7 of the Act, concerted activity is protected if it is undertaken for the mutual aid or protection of the employees, 29 U.S.C. § 157 (1976). However, exceptions exist, including where concerted activity constitutes a partial strike or slowdown. *First National Bank of Omaha*, 171 NLRB 1145, 1149 (1968) ("A concerted stoppage, or strike . . . which is 'partial,' 'intermittent,' or 'recurrent' is commonly cited as a type of unprotected activity"). Employees engage in an unprotected partial strike by "refusing to work but remaining in their work areas or withholding their labor from certain portions of their work while continuing to perform other portions." *Johnnie Johnson Tire Co.*, 271 NLRB 293, 265 (1984). Partial strikes are not protected by the Act because they are attempts by workers to establish working conditions without taking on the risk of the usual consequences associated with a legal strike, such as "loss of pay and risk of being replaced." *First National Bank*, 171 NLRB at 1151.

Based on the evidence I find that the prem techs' action was protected under the Act. Under the "mutual aid and protection" clause of the Act, employees are protected if the engage in an act for the common purpose of improving their "terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). There is a myriad of working conditions that employees may seek to improve, including the imposition of dress codes. See *New River Industries, Inc*., supra at 1294 ("The conditions of employment are sufficiently well identified to include . . . dress codes . . . and the like.") Accordingly, I find that the September 7, protest pertained to their working condition (effort to obtain a sufficient supply of branded apparel); and therefore, was for their "mutual aid and protection". The question then becomes whether the prem techs' action lost the protection of the Act.

The Respondent argues that the prem techs' action on September 7 lost the protection of the Act because it is "a classic partial strike." (R. Br. 16.) The reasons the Respondent cites to support its position are: (1) branded apparel is necessary to perform their positions and the prem techs arrival at work without the apparel show they refused to perform one of their assigned duties; (2) most of the prem techs who participated in the action, changed into company-branded apparel immediately when directed because they understood the rule did not allow them to work in jeans; and (3) case law supports the Respondent's position that by wearing jeans to work the prem techs were engaged in an unprotected partial strike. The General Counsel counters the Respondent's position by arguing: (1) even a presumptively valid rule violates the Act if, as in the present case, it is applied disparately; (2) when instructed to change into branded apparel, every prem tech except for Whitmer immediately complied; and (3) the Respondent was aware of the concerted protected nature of the prem techs' action.

I do not find the Respondent's arguments persuasive. According to the Respondent's witnesses, prem techs have to wear branded apparel so that customers are able to readily identify them as AT& T employees. Therefore, they need to be in branded apparel when they arrive at customers' homes or businesses. There is no evidence, however, any of the prem techs who participated in the protest arrived at customers' homes or businesses in street clothes. The record is clear that when instructed to do so all (except Whitmer) of the prem techs who attended the huddle in street clothes, quickly changed into their branded apparel and went into the field. There is no evidence that other than Whitmer any of the prem techs refused to change into branded apparel or perform any of their duties. Even Whitmer did not refuse to partially perform his job. Rather, he took off the remainder of the day because he did not have clean company-branded apparel to wear for work that day.

Moreover, there was credible evidence that the rule requiring the prem techs to wear branded apparel was not consistently applied. Prem techs and, or union stewards Whitmer, Phillips, VanVickle, and Stephens credibly testified that either themselves or other prem techs have worn nonbranded caps and pants

to work without being disciplined; and are allowed to wear nonbranded coats in frigid temperatures. Supervisors Matney and Jones also acknowledged that despite observing violations of the branded apparel rule, they have never issued a prem tech discipline because of it. Although Griffin has given a "coaching" to "a couple" of prem techs for wearing nonbranded hats, he admits to allowing prem techs to wear nonbranded pants without repercussions. Likewise, he did not issue discipline to employees he observed wearing nonbranded shirts or coats but rather told them to take it off and they complied. It is also undisputed that prem techs Holmes and Mitchell, who participated in the September 7 action, were not disciplined. It was an oversight, but Jones admitted that once it was discovered the error was not corrected. Based on the evidence, I find that the Respondent did not consistently adhere to its rule that prem techs have to wear company-branded apparel to work.

Second, the Respondent's argument that the prem techs were engaged in a partial strike because they knew that one of the Company's rules mandated that they wear branded apparel to work is equally unpersuasive. The evidence shows that while the prem techs knew they were required to wear branded apparel, the supervisors' inconsistent enforcement of the rule rendered the rationale behind it, security, almost meaningless, especially if one considers that employees have to carry company identification badges and drive company-branded vehicles.

Third, I find the cases the Respondent relied on to support its arguments are inapposite. In the present case, the prem techs' intent was to make management aware that there was insufficient access to branded apparel, thus making it difficult to work a mandatory 6-day workweek and comply with the branded apparel rule. Each of the cases cited by the Respondent in support of their unprotected partial strike theory involves specific work duties or tasks that the employees refused to perform, or certain shifts the employees refused to work. See *Honolulu Rapid Transit Co.*, 110 NLRB 1806 (1954) (employees refusing to work on Saturdays or Sundays in several consecutive weeks constituted an unprotected partial strike), *Yale University,* 330 NLRB 246, 247 (1999) (student teaching assistants refusing to submit grades but performing their other duties constituted an unprotected partial strike), and *Audubon Health Care Center*, 268 NLRB 135 (1983) (nurses refusing to cover duties in one section of the hospital while continuing to complete duties in their respective assigned sections was an unprotected partial strike). These cases are distinguishable from the matter at hand because, here, the prem techs were willing to perform their actual job duties (participating in the Friday huddle, gathering their tools, and going to customers locations to perform maintenance and installation, etc.). Moreover, all of the prem techs, except Whitmer, quickly complied with the directive to change into company-branded apparel; and there is no objective evidence that the prem techs' action caused, if at all, anything more than a de minimis delay in serving customers.

The Respondent has proffered no case law indicating that violation of a dress code constitutes failure to complete an essential work duty that can be considered an unprotected partial strike. To the contrary there is case law that wearing casual clothing, shirts, or armbands in protest of a work rule is protected concerted activity. See *American Arbitration Assn.,* 233 NLRB 71 (1977) (addressing employee protest actions including wearing jeans to work and sending questionnaires and letters to arbitrators working with the employer, finding the Act did not protect the actions due to the disparagement and ridicule of the employer in the letters and questionnaires, but not for a failure to complete job duties constituting a partial strike); See also *Stephens Media,* supra*; Medco Health Solutions*, 357 NLRB 170 (2011) (finding employee wearing a shirt critical of a company policy in violation of dress code to be protected concerted activity). There is also an extensive series of cases protecting violations of dress codes in the form of wearing union apparel as a protected concerted activity, even where customers might see the non-conforming apparel. See, e.g., *Chinese Daily News*, 353 NLRB 613 (2008) (employer violated the Act by creating a dress code policy prohibiting employees from wearing clothing with the name or logo other than the employer, specifically including the union); *P.S.K. Supermarkets, Inc*., 349 NLRB 34 (2007) (the Board held the exposure of customers to union buttons, standing alone, is not a special circumstance, nor is the fact that the rule prohibited all buttons, not just union buttons); *Wal-Mart Stores v. NLRB*, 400 F.3d 1093 (8th Cir. 2005), enfg. as modified 340 NLRB 637 (2003) (employer violated the Act because there was no evidence that shirts with union logos interfered with the operation of the store); *Goodyear Tire & Rubber Co*., 357 NLRB 337 (2011) (employer ban on employees wearing T-shirts that said, "scab" in relation to contract employees was not justified by special circumstances).

Under *Washington Aluminum,*[19] employees can lose protection of the Act if their protests are "unlawful," "violent," in "breach of contract," or "indefensible" because it exhibits "a disloyalty to the workers' employer which . . . [is] unnecessary to carry on the workers' legitimate concerted activities." 370 U.S. at 17. There is no accusation (or evidence) that the prem techs' action was unlawful, violent or exhibited an indefensible disloyalty to the Respondent. While the Respondent may argue that the prem techs violated the branded apparel rule, there is no evidence that their action rose to the level of a "breach of contract." Except for Whitmer, none of the prem techs involved in the action refused to perform their duties that day. Moreover, the majority of the prem techs were able to change into their branded apparel, leave the huddle at their normal start time, and complete their daily assignments. The evidence is nonexistent to minimal that the Respondent suffered financial or other operational harm as a result of the September 7 action.

Accordingly, I find that on September 7, the prem techs engaged in concerted protected activity and did not lose protection of the Act. The next question is whether the Respondent disciplined the prem techs for that reason; and I find in the affirmative.

The Respondent's managers testified that they issued discipline because the prem techs wore jeans and, or other nonbranded apparel; and I previously found that before issuing discipline several managers were aware of the reasons the prem techs were taking such action. Investigatory notes from some of

[19] 370 U.S. 9 (1962).

the discipline interviews establish that a few of the prem techs made clear to management that the September 7 was to protest a condition of employment. Moreover, the formal discipline step forms specifically note that they were being issued because the prem techs wore jeans to work; and two of the supervisors acknowledged that on the day the prem techs wore jeans to the huddle, they highly suspected it was a group action to protest working conditions (insufficient supply of company-branded apparel). Hansen testified that when he learned on the same day of the action that some of the prem techs had branded apparel in their car, he concluded that "it was a planned event. . . ." Jones admitted that he and Peters recognized that the prem techs were engaged in a protest action. Furthermore, the fact that the prem techs only wore the jeans to the huddle and not with customers, the majority of the prem techs had their company-branded apparel in their vehicles, they immediately changed into their company-branded apparel when instructed, and there is no persuasive evidence that their protected activity negatively impacted the Respondent's operations. Consequently, this indicates that the disciplines were based entirely on the prem techs protest regardless of whether they refused to perform their job.

Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, The Ohio Bell Telephone Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) and (3) of the Act by the following conduct:

a. when about September 25, 2018, it issued attendance occurrences and placed attendance punctuality discussion documents in the files of Tyler Hill, Brian Hinkle, and Jalen Smith.

b. when about October 12, 2018, it issued attendance occurrences and placed attendance punctuality discussion documents in the files of Anthony Donnelly, Douglas Faiella, and Jesse Canter.

c. when about October 16, 2018, it issued an attendance occurrence and placed an attendance punctuality discussion document in the file of Richard Whitmer.

d. when about September 28, 2018, it issued written warnings to employees Richard Whitmer, Sammy Muoy, Willie Cooley, Nick Kness, Derek Kinsey, Kyle Kemper, Scott McAndrew, Thomas Phelps, Tyler Hill, Brian Hinkle, Jalen Smith, Nick Phillips, and Douglas Orr.

e. when about October 5, 2018, it issued written warnings to employees John Senn, Phillip Rengifo, Dennis Kelty, and Justin Doyle.

f. when about October 8, 2018, it issued written warning to employees Brandon Baliuff, Jason Damron, Ryan Stevens, Rajpal Punia, and Ian McMahon.

g. when about October 11, 2018, it issued written warnings to employees Jesse Lewis, Douglas Faiella, Jesse Canter, and Aaron VanVickle.

3. The above violations are unfair labor practices that affects commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not violated the Act except as set forth above.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily disciplined named employees must remove from its files (both official and unofficial) all references to the discipline relating to the events of September 7.

Backpay for said employees because of the discriminatory discipline shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as provided in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate named employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014).

Further, the Respondent will be required to post and communicate by electronic post to employees the attached Appendix and notice that assures its employees that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Ohio Bell Telephone Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining or otherwise discriminating against its employees in retaliation for their protected concerted activities.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Within 14 days from the date of the Board's Order, make Richard Whitmer, Tyler Hill, Brian Hinkle, Jalen Smith, Anthony Donnelly, Douglas Faiella, and Jesse Canter whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discipline of Ian McMahon, Justin Doyle, Rajpal Punia, Ryan Stevens, Dennis Kelty, Phillip Rengifo, Anthony Donnelly, Aaron VanVickle, Douglas Faiella, Jesse Lewis, Jason Damron, Brandon Balluff,

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

John Senn, Jesse Canter, Richard Whitmer, Sammy Mouy, Willie Cooley, Nick Kness, Derek Kinsey, Kyle Kemper, Scott McAndrew, Thomas Phelps, Tyler Hill, Brian Hinkle, Jalen Smith, Nick Phillips, and Douglas Orr, and within 3 days thereafter notify the same in writing that this has been completed and that the disciplines will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Dublin and Ternstedt garages in Columbus, Ohio, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 26, 2020

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline you or issue you attendance occurrences or attendance/punctuality discussions because you briefly, as a group, wear your street clothes during employee meetings as a way of complaining to us about the condition of your company-issued uniforms or other terms and conditions of your employment.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of your rights guaranteed under Section 7 of the Act.

WE WILL remove from our files all references to the discipline of Ian McMahon, Justin Doyle, Rajpal Punia, Ryan Stevens, Dennis Kelty, Phillip Rengifo, Anthony Donnelly, Aaron VanVickle, Douglas Faiella, Jesse Lewis, Jason Damron, Brandon Balluff, John Senn, Jesse Canter, Richard Whitmer, Sammy Mouy, Willie Cooley, Nick Kness, Derek Kinsey, Kyle Kemper, Scott McAndrew, Thomas Phelps, Tyler Hill, Brian Hinkle, Jalen Smith, Nick Phillips, and Douglas Orr for briefly wearing their street clothes to complain about the condition of their company-issued uniforms and WE WILL notify them in writing that this has been done and that the discipline will not be used against them in any way.

WE WILL remove from our files any attendance occurrences or attendance/punctuality discussions given to Richard Whitmer, Tyler Hill, Brian Hinkle, Jalen Smith, Anthony Donnelly, Douglas Faiella, and Jesse Canter for time spent changing into their uniforms after briefly wearing their street clothes to complain about the condition of their company-issued uniforms, and WE WILL notify them in writing that this has been done and that the occurrences or attendance/punctuality documents will not be used against them in any way.

WE WILL pay employees Tyler Hill, Brian Hinkle, Jalen Smith, Anthony Donnelly, Douglas Faiella, and Jesse Canter for the wages and other benefits they lost because we sent them home to change into their uniforms.

THE OHIO BELL TELEPHONE COMPANY

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/09-CA-233901 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."